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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of ALISON HELMERS
and HENRY BLANK.

ALISON HELMERS,

Respondent,

v.

HENRY BLANK,

Appellant.

G041169

(Super. Ct. No. 00D008672)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Josephine Staton Tucker, Judge, and Thomas H. Schulte, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

McClung & Davis, Paul W. Davis and Charles E. McClung, Jr., for
Appellant.

The Law Offices of Patrick A. McCall, Patrick A. McCall and Marietta E.
Raqueno, for Respondent.

Henry Blank appeals from an order modifying the amount of permanent spousal support he is required to pay his former wife, Alison Helmers. We conclude the order is fundamentally flawed because it arises out of at least two significant procedural errors: (1) Blank was never served with a court order compelling him to respond to discovery promulgated in connection with Helmers' modification motion, and thus could not properly be sanctioned for his failure to comply with that order; and (2) the court's subsequent decision to impose evidentiary sanctions against Blank in connection with the modification motion, based upon his violation of the original unserved order, was never finalized.¹

The modification order is also substantively flawed in that it is not supported by substantial evidence. Stated plainly, a sanction order which prohibits the party opposing a motion from introducing evidence in connection therewith is not the equivalent of an order relieving *the moving party* of her obligation to demonstrate a prima facie case in support of the requested relief. In this case, the court erred in treating the two as equivalent, and thus granting a modification of spousal support without requiring any significant evidence to support it. We consequently reverse the order.

FACTS

Helmers petitioned for dissolution of the parties' marriage in September of 2000. The judgment on reserved financial issues was rendered by David Weinberg, acting as Judge Pro Tem, on April 21, 2006. The judgment divided what appeared to be substantial assets, including a residence in Val Morin, Canada, awarded to Helmers, and a Laguna Niguel residence awarded to Blank. Helmers also received a "RRSP retirement in [Blank's] name in Canada," and the parties divided a "Townsend and Leary 401(k) in

¹ Blank also contends the court made a procedural error when it granted Helmers' ex parte application to relieve the temporary judge designated by the parties to retain jurisdiction over the case and restore the case to the superior court calendar. According to Blank, such an order could not properly be made on an ex parte basis, was consequently "ineffective," and thus all the subsequent orders issued by the superior court were likewise ineffective. We need not address the contention, however, as the ex parte order is not separately challenged on appeal and there are other bases upon which we must reverse the spousal support modification order which is challenged herein.

[Blank's] name." Blank was also required to make a \$140,000 equalizing payment to Helmers. With respect to spousal support, the judgment provided that "[Blank] shall pay to [Helmers] the sum of \$1,000 per month, commencing on September 1, 2004, and continuing one-half on the first and one-half on the fifteenth of each month thereafter, until the death of either party, remarriage of [Helmers] or further order of the court." The judgment also specified that the parties had stipulated "that David S. Weinberg shall remain as Judge Pro Tem for purposes of modification or enforcement of this Judgment."

In June of 2007, Helmers filed her order to show cause re modification of spousal support directly with Weinberg. In July of 2007, she served Blank with a request for production of documents. Blank subsequently notified Helmers' counsel that he would not advance any funds for his half of Weinberg's fee. Helmers' counsel then prepared a stipulation to relieve Weinberg of his responsibilities in the matter, and to return the case to the regular jurisdiction of the superior court, but Blank refused to sign it.

Thus, on August 31, 2007, Helmers moved, ex parte, for an order removing Weinberg from the case and restoring it to the regular jurisdiction of the superior court. Helmers explained she had attempted to have her order to show cause adjudicated by Weinberg, but was thwarted by Blank's refusal to pay his half of the fees, which she did not learn of until shortly before the matter was scheduled to be heard on August 8. When Blank also refused to sign her proposed stipulation to restore the case to superior court, she concluded he was simply attempting to create delay. She asserted that an immediate order was necessary "in order to prevent further delay in this matter," and because the superior court clerk's office was refusing to file her order to show cause while the matter remained assigned to Weinberg. Blank did not appear at the ex parte hearing, and the court granted the requested relief.

Blank did not respond to Helmers' request for production of documents, and in September of 2007, she moved for an order compelling production and imposing

monetary sanctions. The court granted the motion on October 26, 2007, and three days later Helmers sent a letter to Blank, informing him of the court's decision and stating that the production of the documents and payment of sanctions would both be "due . . . within 20 days from the date the Court enters the Order." Helmers also prepared a formal order for the court's signature, and submitted it to the court with a proof of service demonstrating Blank had been served with a copy of the proposed order.

The court ultimately signed the proposed order and entered it as its order on November 26, 2007. The order specified that Blank was required to both produce the documents without objection and pay \$940 in monetary sanctions, within 20 days of its entry. *The record does not reflect that Blank was ever served with that formal order.*

Having received no response from Blank within the time specified by the court's order, Helmers filed a motion for "Issue sanctions, Evidence sanctions [and] Terminating sanctions" on January 15, 2008. The motion explained that because Blank was self-employed, his failure to cooperate with discovery about his current income was especially prejudicial. The motion contained no specification as to the exact "evidence sanctions" or "terminating sanctions" being sought. The most detailed description of the sanctions sought was contained in counsel's declaration, which stated that due to Blank's refusal to cooperate, they "had no choice but to file the instant Motion to preclude [Blank] from entering documents into evidence pertaining to his income and expenses." The declaration requested "issue sanctions, evidence sanctions, and or terminating sanctions against [Blank] so that he *may not introduce evidence pertaining to his income and expenses at the time of the hearing.*" (Italics added.)

Blank appeared, in propria persona, at the February 22, 2008 hearing on the sanction motion. The court immediately questioned Helmers' counsel about whether the formal order compelling Blank to respond to the document request and imposing monetary sanctions, had actually been served on him. "Do you have any proof of service Mr. McCall, showing the formal order of November 26, 2007, was served and when?

Because what your proof of service indicates is that this was served in October. But the – that would only have been the minute order, not the formal order of the court. And the minute order would have been superseded by any formal order.” Helmers’ counsel suggested that Blank didn’t need to be served with the formal order, because he had been earlier *advised by letter* of the court’s ruling. The court indicated it was not impressed with that response, stating to Helmers’ counsel: “I don’t have anything that reflects that you served the formal order on the respondent showing when the court actually entered the order. If that’s the case, then the motion is denied at this time.”

Helmers’ counsel then acknowledged he had no evidence of that service, but argued that, in any event, Blank had received a copy of the formal order “[which] is an exhibit to this motion where he was personally served . . . at the latest, January 20th. I have the proof of service filed. At a minimum, he knew as of January 20th, if not before.”

At that point, the court was apparently distracted by Blank’s attempt to address the merits of Helmers’ claim for increased spousal support. The court ultimately told him “this is not here on the merits of the underlying matter,” and urged Blank to address the document production issue. Blank claimed he had already produced all of the documents requested to Helmers’ prior counsel, and questioned why he should be required to produce documents he had already produced once. He complained that he was representing himself, and insisted he could not afford any costs to reproduce documents already provided.

After both sides argued about whether Blank had actually produced the documents at some prior point, the court proceeded to announce a ruling, without revisiting the problem caused by Helmers’ failure to actually serve the prior order compelling production. The court simply explained to Blank that the previous judge had ordered him to produce the requested documents within 20 days of its order, and it was “clear to the court that you did not comply with that order.” It then stated it was granting

Helmerts' motion, ruling "that respondent will not be permitted to produce or introduce evidence pertaining to his income and expenses at the OSC re modification, and the court is ordering that respondent pay sanctions in the amount of \$1,290." The court then ordered Helmerts' counsel to draft a formal order reflecting its ruling, and to submit that proposed order to Blank for review before filing it with the court for signature.

Although Helmerts' counsel stated he would do so, he did not. Instead, as Helmerts acknowledges, her counsel simply prepared a "notice of ruling" which was served on Blank, and filed with the court the next day. The court did issue a minute order in connection with that February hearing, but it did not detail the specifics of any evidentiary sanctions. Instead, it merely reflected that the court "grants Petitioner's Counsel Motion for Sanctions this date. [¶] Respondent is ordered to pay Petitioner's Counsel Sanctions in the amount of \$1,290.00. [¶] Counsel for Petitioner is to prepare courts [*sic*] order."

The scheduled hearing on the order to show cause took place approximately three weeks later, on March 12, 2008. By that time, Blank had retained counsel, who substituted into the case that day. Helmerts' counsel represented to the court that he had filed a notice of ruling regarding its recent sanction decision, but acknowledged that the notice had apparently "not hit the court's file yet." He then portrayed the court's ruling as having imposed "terminating sanctions as well [as evidentiary sanctions]. It was all-encompassing. That's what our motion was that the court granted summarily." The court then stated it would not "revisit its prior order," but indicated it would "go back and look to see if I said terminating sanctions in my order. I believe it was evidentiary sanctions. I believe that I specifically ordered – even if I said your motion is granted, I believe that I ordered that the respondent was precluded from entering any evidence."

The court then indicated it would continue the order to show cause to a different date, but Helmerts' counsel objected. He noted the court's earlier ruling had stated explicitly that no further continuances would be granted, and then explained that

because Helmers herself had traveled from Quebec, Canada, to be present, any further continuance would be a significant hardship. The court conceded the point and decided it would “hold this for now and we’ll see – we should be able to find sufficient time. We’ll proceed today.”

Blank’s counsel then objected to proceeding with the motion at all, on the basis the parties had initially stipulated in their judgment that all such matters were to proceed before Weinberg. He asserted the court’s earlier ex parte order which had transferred jurisdiction back to the superior court calendar had been made without proper notice to Blank. The court stated it would “take a look at the file” to consider that objection.

After reviewing the file, the court explained it was overruling Blank’s objection, because he had never filed “any motion to set aside that order at any point until you raised that today, approximately, seven months later, and so that order stands.” The court then informed the parties that it would not be able to hear the matter that day, because it had another “specially set matter,” and ordered the parties to report to another courtroom for their hearing on the order to show cause.

When the hearing finally commenced before a different judge, the court accepted into evidence the declaration filed by Helmers in support of her order to show cause, subject to cross-examination. In that declaration, Helmers stated that while Blank had failed to provide her with quarterly profit and loss statements, as required by the judgment, she nonetheless believed, “[b]ased on information I have received and [Blank’s] standard of living” that he is “earning a minimum of \$16,000.00 per month.” She claimed Blank “continues to enjoy the high marital standard of living we enjoyed during our marriage. In fact, during the past two years, [Blank] has traveled extensively outside the United States. [He] had also purchased two new cars since we separated and also has a home with a mortgage of at least \$721,000.” Helmers’ declaration did not explain how she knew these things.

Helmets also declared Blank had earned \$230,000.00 as an advertising executive during the last year of their marriage, but had resigned that position to pursue his own business. At the time of dissolution, he was earning only \$3,000 per month in that new business. However, she opined that “as [Blank] had the ability to earn at least \$230,000.00 per year and is highly recommended in the advertising industry, I firmly believe that he has the ability to earn the same now.”

Helmets’ declaration also included her explanation of why she did not believe the original spousal support order had been fair when entered: “When I was married to [Blank], my job was to tend to our home, our children, and to [his] needs. After my divorce was finalized, I could no longer afford to live in California, which has been my home since 1992 as well as my place of birth. Even though I have attempted to support myself, I [have] simply been unable to do so. . . . I earned my college degree over thirty years ago and many job prospects have passed me by because of my age and my lack of experience in today’s workforce.”

As for her own current situation, Helmets declared: “I have had to move to Quebec, Canada. . . . In Quebec, I am also having difficulties as it is officially a French speaking Province. I am currently employed as a substitute teacher for an English School Board (K-8). As I do not speak French, the substitute jobs are limited and I am offered about one and a half days on average over a ten-month school year. As such, I have had to survive on my 401k to subsidize my income. [¶] . . . I am 55 years old and have medical conditions. I suffer from depression and anxiety and am under a physician’s care. I cannot afford health insurance in California, therefore when I was there my medical costs were out of pocket. I need to gain more experience to get a job. It is difficult, however, to get the experience I need when I cannot afford to live in California where my opportunities for earning potential are the greatest. I would like to pursue my real estate career but I need adequate financial support to do so.”

Helmets also filed an income and expense declaration in connection with the hearing, and took the witness stand to be cross-examined by Blank's attorney. She answered questions about her assets and expenses, and explained she was draining her 401k account, at a rather precipitous rate, to meet her living expenses. She offered no additional evidence relating to Blank's income, expenses, assets or obligations.

Helmets' counsel argued she was entitled to "at least live the marital standard of living," and thus she should receive \$4,500 per month in spousal support. Blank's counsel argued that Helmets' declaration was insufficient to sustain her burden of proof on the order to show cause. He explained the declaration "[d]oes not have any foundation for any income information. I'm not able to put [forth] income information for my client. But the estimate or opinion testimony that my client is making [\$]16,000 is not supported by any foundation for personnel [*sic*] knowledge. [¶] There is no evidence right now what my client's income is. I'm happy to allow them to reopen to submit some evidence. But the declaration as it states, you know, I have an opinion that he is making money that is certainly –" The court then cut in to inquire "Well the point is, does she have to say that? She is asking for \$4,500 a month [based upon the marital standard of living.] [¶] . . . [¶] So she has the need. And the ball is in his park about ability to pay, and he can't testify." Blank's counsel pointed out that because Helmets was the moving party, it was her burden to offer sufficient evidence to support the requested modification. The court, however, disagreed, explaining that Helmets could not establish the necessary evidence "because he won't cooperate with the process."

The court then found that Helmets would require \$115,000 per year to maintain the prior marital standard of living – half of the \$230,000 which she claimed had been the community income during the last year of marriage – and that she is unable to meet that need. It concluded that "\$4500 [per month] . . . is a reasonable request" and thus the court would order that level of support retroactive to August 1, 2007.

The court's formal order included the following findings: (1) "At the time of the parties' date of separation the parties' marital standard of living was \$230,000 per year in which [Helmets] was entitled to enjoy at least one-half of said amount and/or \$115,000 per year"; (2) "The previously issued order for support was not meeting Petitioner's needs"; (3) "that [Helmets] requested support in the amount of \$4,500.00 per month and that said amount is reasonable"; and (4) "The Court refuses to allow [Blank] to submit any proof of [Blank's] income or expenses, pursuant to the prior discovery sanction order dated February 22, 2008, and *finds that no proof of [Blank's] income, expenses, or ability to pay is needed.*" (Italics added.)

I

We first turn to the procedural errors which underlie the modification order. That order relied largely, if not exclusively, on the court's earlier decision to impose evidentiary sanctions against Blank, based upon his failure to comply with an order to compel production of documents. Consequently, we must consider the validity of that decision.

We begin with the court's November 26, 2007 order compelling Blank to produce the documents which had been requested by Helmets. Although it is undisputed the court entered that order on November 26, and that the order required Blank to produce the documents requested by Helmets "within twenty days" of the date this order is entered, it is also undisputed that Helmets *never served* Blank with that order. On appeal, Helmets simply contends (as she did before the trial court) that Blank was sufficiently notified of the court's order because he received both (1) a letter informing him the court had ruled that he would be required to produce the documents within 20 days of the court's entry of an order, *and* (2) a copy of that formal order attached as an exhibit to Helmets' subsequent motion seeking sanctions for his failure to comply with it.

That was not sufficient "notice." Even assuming the letter informed Blank generally that the court had ruled he would be required to produce the documents, it did

not inform him *of the deadline* imposed by the court for that production. It simply informed him the court would be requiring that production to occur within 20 days of an order that would – at some future time – be issued.

And of course, the fact that Helmers later appended a copy of the court's order as one of the four exhibits to her motion for evidentiary sanctions did not cure the notice problem. That motion was filed on January 15, 2008 – approximately one month *after* the deadline for production ultimately specified in the court's order. Thus, Blank was already in violation of the unserved order at the time he received a copy of it. And even assuming Blank saw the exhibit, and apprehended its significance, Helmers' motion made it clear she was no longer seeking production by that point; instead, she was seeking punishment for Blank's failure to have produced the documents *a month earlier*.

At the hearing on the motion for evidentiary sanctions, the court immediately spotted the service problem, and correctly apprehended that it could not impose further sanctions based upon Blank's failure to comply with an order which had never been served upon him. Unfortunately, the court was apparently distracted from that rather fundamental due process problem, and ultimately decided it would impose the evidentiary sanctions anyway. That was error and there is no way around it. Blank could not be punished for his failure to comply with an order of which he had no notice, and the court's subsequent decision to impose an "evidentiary sanction" against him on the basis of that failure cannot be upheld.

But even if the court could have properly imposed the evidentiary sanction, the record establishes that it never actually did so. When the court announced its decision to impose the evidentiary sanctions, it clearly ordered Helmers' counsel to prepare a formal order, submit it to Blank for approval, and then file it with the court for signature. The court's minute order for that date did not even specify any evidentiary sanctions imposed. Under those circumstances, the court's oral ruling, stating it would impose such a sanction, could not amount to anything more than a *tentative* decision. The failure

of Helmers' counsel to submit a proposed formal order to Blank for approval, and to then obtain the court's signature on *that* order, means there was no such order.

California Rules of Court, rule 8.104, is instructive. That rule specifies that for purposes of determining the deadline for appeal, a minute order which announces the court's ruling, but "directs that a written order be prepared," is not "entered" until the date "the signed order is filed." (See also *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1080, citing former California Rules of Court, rule 2(c)(2).) In this case, the order imposing the evidentiary sanctions, was not separately appealable, and thus did not trigger any appellate deadline. Nonetheless, the rule clearly demonstrates the distinction between a minute order which operates as merely a tentative decision, and one which is intended to be final.

Here, the court had made clear, both in its oral directive that Helmers must submit a proposed sanction order to Blank for approval and then present it to the court for signature, and in its minute order which omitted any specification of evidentiary sanctions, that no such sanctions would be effective until the formal order was signed. Because Helmers did not fulfill her responsibility to obtain that order before the order to show cause hearing commenced, she was not entitled to rely upon what she believed the order *would have been*.

This case illustrates why we have such requirements – because if we did not have then only one side would know what was going on and the trial court would be deprived of a chance to resolve the dispute on the merits. Because the court's decision to impose the evidentiary sanction against Blank was both violative of due process and never reduced to a final order, the court that presided over the order to show cause erred in "enforcing" it against Blank.

II

We now turn to the substance of the support modification order. As this court explained in *In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982,

“[m]odification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order.” Moreover, “[t]he moving party *bears the burden of establishing a material change of circumstances since the last order was made* in order to obtain modification of the spousal support order. [Citations.] In determining whether a change of circumstances has occurred, *the trial court is required to reconsider the same standards and criteria set forth in former section 4801 and now Family Code section 4320 it considered in making the initial long-term order at the time of judgment and any subsequent modification order.*”² (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 77-78, italics added, fn. omitted.)

² Family Code section 4320 provides: “In ordering spousal support under this part, the court shall consider all of the following circumstances:

“(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

“(2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

“(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

“(c) The ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and unearned income, assets, and standard of living.

“(d) The needs of each party based on the standard of living established during the marriage.

“(e) The obligations and assets, including the separate property, of each party.

“(f) The duration of the marriage.

“(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

“(h) The age and health of the parties.

“(i) Documented evidence of any history of domestic violence, as defined in [Family Code] Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

“(j) The immediate and specific tax consequences to each party.

“(k) The balance of the hardships to each party.

“(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in [Family Code] Section 4336, a “reasonable period of time” for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court’s discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, [Family Code] Section 4336, and the circumstances of the parties.

“(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with [Family Code] Section 4325.

“(n) Any other factors the court determines are just and equitable.”

In this case, Helmers failed to satisfy her burden of demonstrating changed circumstances which might warrant a modification of support. As Blank's counsel pointed out at the hearing, her request was based largely on the assertion she believed Blank was earning \$16,000 per month – or at least fully capable of doing so. However, she offered no evidence to support either conclusion, other than assertions about the vacations he allegedly took, the cars he had allegedly purchased in the wake of the divorce, and the fact he was apparently continuing to pay the mortgage on the Laguna Niguel home they had shared during their marriage.

As for her own circumstances, Helmers likewise failed to demonstrate any meaningful change. The court had imputed \$12,000 per year in earnings to her at the time of the dissolution judgment, and she offered evidence demonstrating she had earned \$750 in February of 2007, and \$2,400 for the month of February of 2008, although she asserted the latter was an aberration. Primarily, her modification argument focused on the assertion that the original support order contained in the judgment had not been “fair” at the time it was made, since she had been out of the workforce during the last 18 years of marriage, and “many job prospects have passed me by because of my age and my lack of experience in today’s workforce.”

Although the court clearly agreed with her, basing its decision to modify support largely on the fact that the marital standard of living had been \$230,000 per year, and she was “entitled to enjoy at least one-half of said amount,” it was error to modify on that basis. The prior order, whether “fair” or not, was final, and it could be modified only upon a proper showing of some material change in the parties’ respective circumstances. Not only did the court fail to make any finding of changed circumstances, it also expressly concluded that no evidence of Blank’s “income, expenses, or ability to pay [was] needed” to justify the modification. That was error as well. In considering an award of permanent spousal support, the court has no discretion to ignore any of the factors listed in Family Code section 4320, except to the extent they are irrelevant in the

particular circumstances of the case. “In ordering spousal support, the trial court must consider and weigh all of the circumstances enumerated in the statute, to the extent they are relevant to the case before it. . . . [¶] . . . [¶] . . . [T]he court does not have discretion to ignore any relevant circumstance enumerated in the statute. To the contrary, the trial judge must both recognize and apply each applicable statutory factor in setting spousal support. [Citations.] Failure to do so is reversible error. [Citations.]” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302-304, italics and fn. omitted; see also *In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090, 1106 [“a sustainable exercise of discretion requires that the trial court have considered and applied all relevant factors under section 4320”].)

Helmets argues, in essence, that she was relieved of any burden to prove Blank’s income by the evidentiary sanction imposed against him. Setting aside for the moment our conclusion that no such sanction was either technically imposed or could have been imposed in the absence of proper notice, we nonetheless reject the assertion. Helmets’ specific contention is that “[a]s [Blank] could not produce evidence on his income at the hearing . . . there was simply no evidence to rebut [her] position [he] makes \$16,000.00.” But that contention confuses Helmets’ “position” with her evidence. Her “position” is merely her contention. In order to prevail on the motion, she needed *evidence* to support that contention – and she offered none. The fact Blank could not introduce evidence on the question of his finances meant he could not contradict her evidence, but it did not relieve her of the burden of *offering* some.

We are likewise unpersuaded by Helmets’ assertion that it was Blank’s obligation to tease-out the basis for her contention when he cross-examined her at the hearing. The fact that he *could have done that* in no way obligates him to do so. The evidentiary burden was hers.

Finally, we reject Helmets’ contention that the court’s [proposed] evidentiary sanction was “tantamount” to a terminating sanction. Not only was it

specifically proposed as merely a limit on *the evidence* which Blank could introduce at the hearing, but an abstract “terminating” sanction would have done Helmers no good in this case. In the absence of some evidence upon which the court can base appropriate findings, it simply could not properly exercise its discretion in deciding whether, and to what extent, it should modify the support order. This is not a simple yes-or-no question. Some sort of *issue* sanction, or perhaps an order deeming specific matters admitted, might have been properly relied upon as a basis for satisfying Helmers’ burden of proof, but no such thing was requested in this case.³

In the absence of substantial evidence (1) demonstrating a material change in circumstances since the court issued its earlier spousal support order; and (2) bearing upon the factors set forth in Family Code section 4320 – factors which the court was required to consider in deciding whether to modify the parties’ prior spousal support order – the court had no discretion to modify the order. Because it did so without requiring such evidence in this case, we have no choice but to reverse the order.

³ Code of Civil Procedure section 2023.030, subdivision (b) defines “issue sanctions” as including an order “that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process.”

The order is reversed. Blank is to recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.